

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR EXTENSION OF TIME TO PERFECT)	
BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 36362-76LJ BY REGIONAL)	
ENTERPRISES, INC.)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the July 25, 1990 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Extension of Time to Perfect Permit No. 36362-76LJ is hereby granted subject to the following conditions:

1. The date of completion and filing of the Notice of Completion shall be November 30, 1995.
2. The Permittee shall submit annual progress reports to the Kalispell Water Resources Field Office no later than November 30 of each year until the project is complete or the extension of time expires.

NOTICE

The Department's Final Order may be appealed in accordance

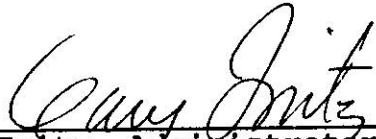
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CASE # 36362

with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 28th day of August, 1990.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

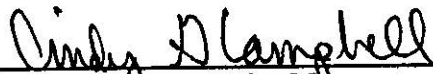
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 28th day of August, 1990 as follows:

Regional Enterprises, Inc.
Rolland B. Andrews
P.O. Box 2492
Kalispell, MT 59903-2492

Judy M. Meeks
Box 1117
Kalispell, MT 59903-1117

Chuck Brasen, Field Manager
Kalispell Water Resources
Field Office
P.O. Box 860
Kalispell, MT 59903-0860



Cindy G. Campbell
Hearings Unit Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR EXTENSION OF TIME TO PERFECT)	
BENEFICIAL WATER USE PERMIT)	PROPOSAL FOR DECISION
NO. 36362-76LJ BY REGIONAL)	
ENTERPRISES, INC.)	

* * * * *

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on July 12, 1990, in Kalispell, Montana.

Applicant Regional Enterprises, Inc. appeared by and through Rolland B. Andrews.

Jay Billmayer, Billmayer Engineering, appeared as a witness for the Applicant.

Chuck Brasen, Field Manager of the Kalispell Water Resources Field Office of the Department of Natural Resources and Conservation (hereafter Department), attended the hearing.

PRELIMINARY MATTERS

A hearing was held on June 19, 1989 in the above-entitled matter. Because there was a procedural error in the notification process, this matter was remanded to the Hearings Unit of the Department for rehearing. The procedural error was failure to serve notice of the hearing on Objector Judy Meeks. Ms. Meeks was notified of the time, date, and place of the instant hearing, but failed to make an appearance. Ms. Meeks' objection is therefore dismissed by default.

CASE # 36362

Since Ms. Meeks did not appear at the hearing, the Applicant was allowed to use the exhibits introduced at the previous hearing without going into great detail. Applicant also asked if the testimony given at the previous hearing could be incorporated into the record of the instant hearing. Since Objector Meeks did not appear, the Hearing Examiner determined there was no reason to deny the request. The record of the previous hearing is hereby incorporated into the record of the instant hearing.

EXHIBITS

Applicant's Exhibit 1 is a copy of a bid for the drilling of a well for John Q. Hammonds by Liberty Drilling Company dated June 5, 1989.

Applicant's Exhibit 2 is a copy of a bid for the drilling of a well for John Q. Hammonds by Billmayer's Water Supply dated May 30, 1989.

Applicant's Exhibit 3 is a copy of a map identifying the general property location.

Applicant's Exhibit 4 is a copy of a cost estimate for the supervision of the administration, drilling pump test data, and filing form with Helena by Billmayer Engineering Services dated June 9, 1989.

The Department file on the Application for Extension of Time was made available to all parties for review. No party made objection to any part of the file, therefore, the Department file is included in the record in its entirety.

Having reviewed the record of this matter and being fully advised in the premises, the Examiner proposes the following Findings of Fact, Conclusions of Law, and Proposed Order.

FINDINGS OF FACT

1. Section 85-2-312(3), MCA, states in relevant part:

The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first-class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party. . .

2. On October 30, 1984, Permit to Appropriate Water No. 36362-76LJ was granted to Regional Enterprises Inc. with a priority date of April 27, 1983 at 4:35 p.m. The permit was to appropriate 700 gallons per minute up to 864 acre-feet of groundwater per year to be used for domestic and commercial purposes in Sections 19 and 24 of Township 29 North, Range 22 West in Flathead County. The Applicant was required under the terms of the permit to complete the project and apply the water as specified in the permit on or before December 1, 1988.

3. On November 29, 1988, the Department received an Application for Extension of Time for Permit No. 36362-76LJ. The Applicant requested an additional five years in which to complete the proposed project. This was the first request for additional time received for that permit.

4. The pertinent portions of the Application were published in the Daily Interlake, a newspaper of general circulation in the area of the source, on December 21, 1988.

5. A timely objection to this Application was filed by Judy M. Meeks and received by the Kalispell Field Office on January 6, 1989. The basis of her objection was that the work was not completed as required.

6. According to Department records, Objector Meeks has two water rights of record. Certificate of Water Right No. C020214-76LJ is for a well used for domestic purposes and Certificate of Water Right No. C052695-76LJ is for a well used for irrigation purposes. However, Ms. Meeks' objection was subsequently dismissed and was not considered in reaching a decision in this matter. See Preliminary Matters, *supra*.

7. The Department notified the Applicant on a Notice of Action on Application for Extension of Time, Form 616, dated March 9, 1989, that it was proposing to deny the request based on lack of due diligence.

8. An administrative hearing was requested by the Applicant on May 2, 1989.

9. A project of the magnitude proposed by the Applicant requires much planning and preparation. Although little work has been done on the land, there has been considerable progress in the form of obtaining bids from well drillers; a developer, John Q. Hammonds, has been obtained; a public water supply system has been designed to provide water service to a restaurant, motel, and lounge complex; said plans have been submitted to and approved by the Department of Health and Environmental Sciences; several plans have been drawn for the proposed project; and market studies have been made to test the feasibility of the project. (Department records, Applicant's Exhibits 1 and 2 and testimony of Rolland B. Andrews.)

10. Future plans include updating the bids for drilling the well; drilling the well this year; begin construction on water part of the project by December of 1992 with completion by 1993. (Testimony of Jay Billmeyer and Department file.)

11. The time needed to complete a hotel complex such as that proposed for this project, is generally 18 to 22 months after beginning. Since it is so late in the year, probably the starting date will be postponed until the construction season of 1991. (Testimony of Rolland B. Andrews)

12. It is difficult to establish when the total beneficial water use will be completed. The core of the project, the hotel complex, will surely be completed within the five years requested. However, it is impossible to determine when the residential lots

will be sold, therefore, impossible to predict the date of completion according to the Department's definition of completion. Probably in 10 years, all residential lots will be sold, construction completed and water put to use. (Testimony of Jay Billmayer.)

13. Section 85-2-312(2), MCA, states in relevant part,

The department shall specify in the permit or in any authorized extension of time provided in subsection (3), the time limits for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. The department shall issue the permit or authorized extension of time subject to the terms, conditions, restrictions, and limitations it considers necessary to ensure that the work on the appropriation is commenced, conducted, and completed and that the water is actually applied in a timely manner to the beneficial use specified in the permit.

This statute implies that the Applicant should be given 10 years to complete the project. However, the Applicant applied for a five year extension and the public notice so stated. (Department file.)

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule appearing fulfilled, the matter is properly before the Examiner. See Findings of Fact 4, 7, and 8.

3. An Applicant for Extension of Time must show good cause why the time limit set forth on the Beneficial Water Use Permit should be extended. See § 85-2-312(3).

4. The Applicant has shown diligence toward completing the proposed project. Although there has been little progress on the ground, there has been considerable progress in the form of plans and preparation for the actual work. See Findings of Fact 9 and 10.

5. The Applicant has definite plans toward completing the project within the next five years with the exception of the residential lots. Therefore, Applicant has shown a bona fide intent to complete the project. See Findings of Fact 10 and 11.

6. A five year extension, the time requested by the Applicant, will not be adequate for the entire project to be completed. See Finding of Fact 11, 12, and 13. To grant a ten year extension of time without notification of all persons who may be adversely affected, would deny them due process.

7. The Applicant has shown due diligence. Though there has been no construction on the property, there has been substantial progress in planning and preparation to begin construction. See Findings of Fact 9, 10, 11, and 12.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Extension of Time to Perfect Permit No. 36362-76LJ is hereby granted subject to the following conditions:

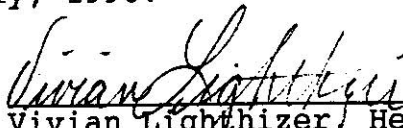
1. The date of completion and filing of the Notice of Completion shall be November 30, 1995.
2. The Permittee shall submit annual progress reports to the Kalispell Water Resources Field Office no later than November 30 of each year until the project is complete or the extension of time expires.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 25th of July, 1990.


Vivian Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

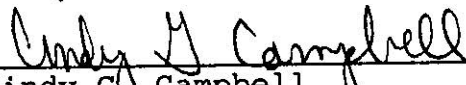
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 25th day of July, 1990, as follows:

Regional Enterprises, Inc.
Rolland B. Andrews
P.O. Box 2492
Kalispell, MT 59903-2492

Judy M. Meeks
Box 1117
Kalispell, MT 59903-1117

Chuck Brasen, Field Manager
Kalispell Water Resources Field Office
P.O. Box 860
Kalispell, MT 59903-0860


Cindy G. Campbell
Hearings Unit Secretary

BB

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR EXTENSION OF TIME ON BENEFICIAL) PROPOSAL FOR DECISION
WATER USE PERMIT NO. 36362-g76LJ)
GRANTED TO REGIONAL ENTERPRISES, INC.)

* * * * *

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on June 19, 1989, in Kalispell, Montana. Applicant for extension, Regional Enterprises, Inc. (hereafter, referred to as "Applicant"), was represented by Rolland B. Andrews.

Chuck Brasen, Field Manager of the Kalispell Water Rights Bureau Field Office, of the Department of Natural Resources and Conservation (hereafter, "Department"), was also present at the hearing.

EXHIBITS

Applicant offered four exhibits for inclusion in the record.

Applicant's Exhibit 1 is a copy of a bid for the drilling of a well for John Q. Hammons by Liberty Drilling Company dated June 5, 1989.

Applicant's Exhibit 2 is a copy of a bid for the drilling of a well for John Q. Hammons by Billmayer's Water Supply dated May 30, 1989.

CASE # 36362

Applicant's Exhibit 3 is a copy of a map identifying the general property location.

Applicant's Exhibit 4 is a copy of a cost estimate for the supervision of the administration, drilling, pump test data, and filing form with Helena by Billmayer Engineering Services dated June 9, 1989.

Having reviewed the record of this matter and being fully advised in the premises, the Examiner proposes the following Findings of Fact, Conclusion of Law, and Proposed Order.

FINDINGS OF FACT

1. Section 85-2-312(3), MCA, states in relevant part:

The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. The department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. Upon receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. The department may serve notice by first-class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party

...

2. On October 30, 1984, Permit to Appropriate Water No. 36362-g76LJ was granted to Regional Enterprises Inc. with a priority date of April 27, 1983 at 4:35 P.M. The Permit was for 700 gallons per minute up to 864 acre-feet of water per annum. It was to be used for domestic and commercial purposes in Sections 19 and 24 of Township 29 North, Range 22 West in Flathead County. Applicant was required under the terms of the permit to complete the appropriation works, and have applied water to a beneficial use as specified in the permit on or before December 1, 1988.

3. On November 29, 1988, the Department received a request for additional time in which to put the water to use. The request asks for an additional five years in which to get the project operational.

4. The pertinent portions of the Application for Extension of Time were published in the Daily Interlake, a newspaper of general circulation in the area of the source, on December 21, 1988. The notice stated the Applicant was requesting an additional five years in which to perfect the project. One objection was received regarding the request.

5. An objection was filed by Judy M. Meeks and was postmarked January 3, 1989, and received by the Kalispell Field Office on January 6, 1989. The basis of her objection is that the work was not completed as required. Ms. Meeks also cites two certificates of water right; one of which has a later priority

date than that of Regional Enterprises, Inc. (See Findings of Fact No. 11.)

6. The Department notified the Applicant on a Notice of Action on Application for Extension of Time, Form 616, dated March 9, 1989, that it was proposing to deny the request. The proposal to deny was based on a lack of showing of due diligence toward completion of the project.

7. The Applicant by letter of May 2, 1989 requested an administrative hearing on the Department's denial of the extension of time.

8. A show-cause hearing was scheduled for June 19, 1989, at 9:00 a.m. in Kalispell, Montana.

9. Ms. Judy M. Meeks was notified of the Department's original decision and was not notified of the show-cause hearing that was held on June 19, 1989.

10. Ms. Judy M. Meeks was notified of the original Application for Beneficial Water Use Permit, but did not object at that time.

11. Ms. Judy M. Meeks has two water rights recorded with the department:

<u>File No.</u>	<u>Priority Date</u>	<u>Rate</u>	<u>Volume</u>	<u>Type of Use</u>
C020214-g76LJ	11:35 9-08-78	20 gpm	1.5 AF	Domestic
C052695-g76LJ	9:00 5-10-83	46 gpm	15.2 AF	Irrigation

Both of these groundwater certificates are located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, Township 29 North, Range 21 West, Flathead County.

12. Mr. Rolland B. Andrews, President of the Regional Enterprises Inc., testified at the hearing that there was no firm commitment by anyone of when the project might begin or may be completed.

13. Mr. Rolland B. Andrews also testified that a man by the name of John Q. Hammons is the primary investor and holds the franchise to the Holiday Motor Inn for the Kalispell area and that Mr. Hammons is waiting for the economy of the state to improve.

14. Mr. Rolland B. Andrews testified that Mr. John Q. Hammons feels that the economics is beginning to improve in the Kalispell area.

15. Mr. Andrews testified that they have not started any construction on the project.

16. There was also testimony given indicating that part or all of the engineering has been completed, and that Mr. Hammons has the financing to build the project.

17. When the permit was authorized on October 30, 1984, there was a special condition attached which stated:

The permit is subject to the Permittee submitting a progress report showing satisfactory progress toward development and completion of this permit to the Water Rights Bureau Field Office at 3220 Hwy 93 S., P. O. Box 860, Kalispell, MT 59903 on or before December 1, 1986.

18. The Department received a progress report from J. Jay Billmeyer on behalf of Regional Enterprises, Inc. on November 28, 1986. On November 11, 1987, another report was filed by J. Jay

Billmayer on behalf of Regional Enterprises Inc. stating they were selling the property to John Hammons Industries and that the development should be constructed within the next year.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and over the parties hereto.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule appearing fulfilled, the matter is properly before the Examiner to the Application, but not to the Objector. The Objector was not notified of the hearing and was not present at the Hearing.

3. The Applicant for the Extension of Time must show diligence toward the completion of the appropriation works and putting water to a beneficial use. See In the Matter of the Application for Extension of Time to Perfect Beneficial Water Use Permit No. 39787-s76H Transferred to Marvin and Mary Ann Rehbein, Proposal for Decision, June 16, 1988, pp. 5-9 (Final Order, January 24, 1989).

4. Concern does exist as to possible speculation on the part of the Applicant for putting water to use. Applicant could be simply using the permit to enhance the value of the property. The testimony and evidence presented by the Applicant shows that little to no diligence has been exercised in regard to getting

this project started and water put to use under this permit.

(See Finding of Fact No. 13, 14, and 15.)

5. An Extension of Time in which to complete this permitted project appears to be unjustified due to the amount of work and capital investment put forth in the last four years the Applicant has held this permit. (See Findings of Fact No. 12 and 13.)

6. An Extension of Time in which to complete this permitted project appears unjustified due to the circumstances presented to the Examiner. The evidence and testimony presented, over and above that presented on the original extension application, does not indicate diligence in pursuit of completion of the project has occurred.

7. The Objector has been denied due process by the Department in this matter by not being notified of the hearing or being allowed to present her case as to why the Department should either grant or deny the extension to the Applicant. However, in this case it does not matter because the Applicant has failed to show reasonable diligence of good faith effort toward the completion of this project.

8. The Department's original proposed Notice of Action was based solely on information contained on the application form. The Applicant bears the burden of providing sufficient initial information on the application form for the Department to make a reasonable determination of whether the permit has been pursued with due diligence. In this case such information was not provided so the proposed denial of an extension was issued. The

information presented at the hearing was not sufficiently greater than that presented at the time of the application for extension and failed to show due diligence and/or sufficient reason for lack thereof to reverse the Department's initial proposed decision.

WHEREFORE, the Examiner proposes the following:

PROPOSED ORDER

Application for Extension of Time to Perfect Beneficial Water Use Permit No. 36362-g76LJ by Regional Enterprises Inc. is hereby denied.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. Section 2-4-623, MCA.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DATED this 27 day of Sept., 1989.

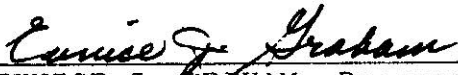
T. J. Reynolds
T. J. Reynolds, Hearing Examiner
Department of Natural Resources and
Conservation
1520 East Sixth Avenue
Helena MT 59620-2301

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served by mail upon all parties of record at their address or addresses this 27th day of September, 1989, as follows:

ROLLAND B. ANDREWS
REGIONAL ENTERPRISES, INC.
PO BOX 2492
KALISPELL MT 59903-2492

CHUCK BRASEN
DNRC - WATER RIGHTS FIELD OFFICE
PO BOX 860
KALISPELL MT 59903
(inter-departmental mail)


EUNICE J. GRAHAM, Program Assistant
Department of Natural Resources and
Conservation
1520 E. 6th Avenue
Helena MT 59620-2301